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No. 93-6892

In The

Supreme Court of the United States

October Term, 1993

MATHEW WAYNE TOME,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

1. INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the National Association of Criminal Defense Lawyers (NACDL). It supports the Petitioner, Mathew Wayne Tome, and advocates reversal. Counsel for Petitioner and the Solicitor General have consented to the filing of this brief.

The NACDL is a District of Columbia non-profit corporation whose membership is comprised of more than 7,000 regular members and 25,000 affiliate members representing lawyers from every state. Members serve in

positions bringing them into daily contact with the criminal justice system in state and federal courts, and regularly represent defendants in federal criminal trials and appeals.

The NACDL is the only national bar organization working exclusively on behalf of public and private criminal defense lawyers and their clients, and is dedicated to the preservation and improvement of our adversary system of justice. The *Amicus Curiae* Committee of the NACDL has discussed this case and decided that the evidentiary issue presented is of such importance to the development of the law that the NACDL would like to offer its assistance to the Court.

2. SUMMARY OF THE ARGUMENT

Under Evidence Rule 801(d)(1)(B) only those prior consistent statements made before a motive to fabricate are admissible; prior consistent statements made after a motive to fabricate are inadmissible. This reading of the rule is based on the language of the rule, interpreted in light of its underlying history, and is supported by many trial and appellate policies.

If this Court adopts the interpretation of the rule advocated by the United States, the statements involved in this case do not meet the threshold standards of relevancy and reliability adopted by those courts that have admitted post-motive prior consistent statements. *Amicus* also suggests that a party seeking to admit prior consistent statements made after a motive to fabricate must show that the circumstances surrounding the making of

the statement demonstrate sufficient indicia of reliability similar to those required in the confrontation cases of this Court. The prior consistent statements involved in this case do not meet these threshold requirements of reliability, and should have been excluded even under the interpretation of the rule advocated by the government.

3. ARGUMENT

I. THE TRADITIONAL RULE IS THE BETTER RULE.

This case concerns the interpretation of Evidence Rule 801(d)(1)(B). Some courts interpret the rule as allowing only the admission of prior consistent statements that precede any motive to fabricate. *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978) (prior consistent statement must antedate the motive to fabricate). This brief refers to the *Quinto* rule as the traditional rule. *See* Edward D. Ohlbaum, Note, *The Hobgoblin Of The Federal Rules of Evidence: An Analysis Of Rule 801(d)(1)(B). Prior Consistent Statements And A New Proposal*, 1987 B.Y.U. L.Rev. 231, 232 (using this terminology) [hereinafter cited *Ohlbaum*]. Other courts interpret Rule 801(d)(1)(B) more broadly, and also permit the admission of prior consistent statements made after any motive to fabricate, if the statements are relevant. *United States v. Miller*, 874 F.2d 1255 (9th Cir. 1989). This brief refers to the *Miller* rule as the relevancy rule.

1. Basic Rationales: Language and History.

Rule 801(d)(1)(B) provides for the admission of prior consistent statements offered to rebut an express or

implied charge of recent fabrication or improper influence or motive. By its express terms, it is limited to prior consistent statements that rebut the suggestion that the witness's trial testimony reflects a change in position.

Quinto, most often relied on in support of the traditional rule, reasons that a prior consistent statement made after a motive to fabricate simply does not rebut a charge of fabrication. Such a statement adds nothing to the witness's credibility, because it does not help to know that a witness has repeated the same thing many times before. "If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible." 582 F.2d at 235; *see also Ohlbaum*, at 242 ("Since there was no difference between the probative value of the prior statement made after the motive arose and that made in court, such a statement constituted mere repetition, and was therefore merely cumulative and inadmissible.").

Implicit in the traditional rule is the idea that Rule 801(d)(1)(B) contains its own built-in consideration of relevancy and reliability. *Quinto*, 582 F.2d at 232-33. The traditional rule makes the timing of the prior consistent statement the conclusive issue. Statements made before the motive to fabricate are relevant and reliable evidence that rebut a charge of fabrication. Conversely, prior consistent statements made after the motive to fabricate are excluded because they do not "rebut" the charge that the trial testimony has been fabricated. Instead, they show only that the witness repeated his tainted statements.

In contrast, the relevancy rule is based on the assumption that Rule 801(d)(1)(B) does not make the

timing of the statement conclusive. It reflects the view that a *per se* timing rule should give way to a more flexible approach that allows consideration of even prior consistent statements, made after a motive to fabricate, if "other surrounding circumstances" give them "significant probative value." *Miller*, 874 F.2d at 1274. These circumstances must indicate that the prior consistent statement has significant probative force apart from mere repetition. *Id.* Under the relevancy rule, Rule 801(d)(1)(B) contains very limited prerequisites for the admission of prior consistent statements, and Evidence Rules 402 and 403 provide the governing analysis. *Miller*, 874 F.2d at 1272.

In support of their conclusions, courts on both sides of the issue have examined the language of Rule 801(d)(1)(B). Courts following the traditional rule interpret the rule as including a temporal requirement. *Quinto*, 582 F.2d at 234; *see also Ohlbaum*, at 246 (the term "recent" introduces a temporal requirement).

In contrast, those courts following the relevancy rule conclude that the language of the rule does not clearly express that requirement. *See, e.g. United States v. Parodi*, 703 F.2d 768, 784 (4th Cir. 1983) (stating that the rule itself precludes a timing limitation); *United States v. Hamilton*, 689 F.2d 1262, 1273 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983).

The history underlying the rule is helpful and necessary in determining the meaning of the rule. The courts have engaged in an historical analysis. Unfortunately, they disagree on the legal history underlying the rule. *Compare Quinto*, 582 F.2d at 232-34 with *Parodi*, 703 F.2d at

786 (contrary to the assumption in *Quinto*, federal courts before the adoption of the Federal Rules of Evidence were given flexibility and latitude in admitting prior consistent statements).

Quinto characterizes a two-hundred-year general prohibition against the use of prior consistent statements. Exceptions were narrowly drawn only for statements made before the motive to fabricate existed. 582 F.2d at 232. *Quinto* characterized this as the "traditional" standard, and concluded that Rule 801(d)(1)(B) did not intend to alter it. 582 F.2d at 233. Rather, the only change was that prior consistent statements that preceded the motive to fabricate, formerly admissible only to rehabilitate the witness, could now be used as substantive evidence. 582 F.2d at 233-34.

Professor Ohlbaum and Judith Archer agree that the *Quinto* assessment of the history underlying the rule is the correct one. "Courts at common law originally took a narrow view of the admissibility of prior consistent statements. When offered as substantive evidence, prior consistent statements were inadmissible because the statements were hearsay." Judith A. Archer, Note, *Prior Consistent Statements: Temporal Admissibility Standard Under Federal Rule Of Evidence 801(d)(1)(B)*, 55 Fordham.L.Rev. 759, 762 (1987) [hereinafter cited *Archer*]. These statements were deemed unreliable and cumulative. *Id.* at 762-63. Later, they were permitted in response to an attack that a witness's testimony was the result of

recent fabrication or motive, but with the limitation that they had to precede the motive to fabricate. *Id.* at 766.[1]

According to Professor Ohlbaum, the traditional underpinnings of the Rule permitted the admission of a prior consistent statement only where it predated the witness's alleged motive to fabricate. *Ohlbaum*, at 238-39. He concludes that before the promulgation of the Rule in 1975, the treatment of prior consistent statements developed in three stages. In the first stage, prior consistent statements could be admitted without limitation, and were considered substantive evidence. In the second stage, they were permitted to corroborate live testimony, even when the witness had not been impeached. In the third stage, prior consistent statements were no longer permitted on direct examination, and were admissible only to rehabilitate the witness when his credibility had been attacked. In the third stage, prior consistent statements had to have been made before the motive to fabricate arose. *Ohlbaum*, at 234-39.[2]

Against this background, *Quinto's* view that the rule must be interpreted consistently with the law as it had developed just before the adoption of the rule is sound. The language of the rule does correspond to that body of

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[1] Archer states that common law courts also permitted the admission of prior consistent statements under the doctrine of completeness. *Id.* at 766. That doctrine, expressed in Feb. R. Evid. 106, is not in issue here.

[2] There is another law review article the Court might find useful: Graham, *Prior Consistent Statements: Rule 801(d)(1)(B), the Federal Rules of Evidence, Critique and Proposal*, 30 Hast.L.J. 571 (1979) [hereinafter cited *Graham*].

existing law: it requires an allegation of recent fabrication, and it includes the requirement that the prior consistent statement "rebut" the claim of fabrication. Because the language closely reflects the law as it had developed immediately before the adoption of the rule, the language suggests no change in the standard for admission: the prior consistent statement is admissible under the rule only if it preceded the motive to fabricate. *Ohlbaum*, at 245 (Rule 801(d)(1)(B) employs the precise language – " 'rebut[ting] . . . charge[s] . . . of recent fabrication or motive' – consistently used in the panoply of pre-1975 decisions.") It stands to reason that Congress was aware of the common law prerequisite that the prior consistent statement must precede any motive to fabricate, and carefully chose its language in Rule 801(d)(1)(B) to reflect that prerequisite. *United States v. Salerno*, ___ U.S. ___, 112 S.Ct. 2503, 2507 (1992) (assuming that in enacting the Evidence Rules, Congress makes careful judgments about admissibility, and that the plain language of the particular evidence rule governs).

The only change adopted by the Rule in 1975 is that the prior consistent statements, once admitted, could be given substantive effect. This was a relatively minor change that realistically had little effect, since most juries were probably ill-equipped to treat a prior consistent statement as "rehabilitative", yet to understand that it was not to be considered as "substantive evidence". The change simply did away with a distinction that meant nothing to juries anyway. *Archer*, at n.121.

Parodi, however, makes the distinction between rehabilitative and substantive evidence the basis for creating yet a third rule, in addition to the traditional rule and the

relevancy rule, which distinguishes between prior consistent statements used for rehabilitation, and those prior consistent statements used for substantive purposes. Under the *Parodi* approach, any prior consistent statements can be used to rehabilitate, but only those that precede any motive to fabricate can be used as substantive evidence. 703 F.2d at 785-86; *See also United States v. Brennan*, 798 F.2d 581, 587-88 (2d Cir. 1986) and *United States v. Harris*, 761 F.2d 394, 398-400 (7th Cir. 1985) (drawing the same distinction); *Ohlbaum*, at n. 145 (discussing this line of authority).

The *Parodi* approach has been criticized. *Miller* rejects the idea that Rule 801(d)(1)(B) creates different temporal standards for admissibility based on whether the statements are used for rehabilitation or as substantive evidence. 874 F.2d at 1272-73. According to *Miller*, Rule 801(d)(1)(B) expanded the use of the prior consistent statements, but did not create different standards. *Id.* Commentators have also criticized the idea that the rule creates different temporal standards depending on the purpose for which the statements are offered. *Ohlbaum*, at 286-88; *Archer*, at 780.

When the reasoning in *Parodi* is examined, it is questionable whether *Parodi* casts real doubt on *Quinto's* historical analysis. *Parodi's* reliance on Judge Friendly's language in *United States v. Rubin*, 609 F.2d 51, 68-69 (2d Cir. 1979, Friendly, J., concurring), *aff'd*, 449 U.S. 424 (1981), to suggest that post-motive prior consistent statements are freely admissible when introduced for rehabilitation, is incorrect. *Miller*, 874 F.2d at 1273 n.12. Founded on its mistaken view of history, *Parodi's* general conclusion that prior to the adoption of Rule 801(d)(1)(B),

courts had wide latitude to admit prior consistent statements, is not forceful.

Given the common law background prior to the adoption of the rule in 1975, *Quinto's* interpretation of the rule is anchored in legal history, and it is this history that provides a foundation for any interpretation. When the relevancy-rule courts interpret Rule 801(d)(1)(B) as if it were born, full grown, in 1975, and conclude that the language supports their view that flexibility should permit them to assess the admissibility of prior consistent statements, they are mistaken. Their view cannot be squared with the the history of the rule.

2. Flexibility is not an appropriate rationale.

Advocates of the relevancy rule believe that flexibility is an advantage, and that the jury can determine the reliability of any prior consistent statement made after a motive to fabricate. *See, e.g., Hamilton,* 689 F.2d at 1273. By adopting a relevancy standard under Evidence Rule 402, the relevancy-rule courts have adopted probably the broadest and easiest standard for admissibility in all of the evidence rules. Rather than treat Rule 801(d)(1)(B) as a significant rule designed to provide discrete and meaningful treatment of prior consistent statements when used to rehabilitate a witness, the relevancy rule involves Rule 801(d)(1)(B) only peripherally and deflects the governing analysis to either the hearsay rules, or Evidence Rule 402. When relevancy-rule courts rely on flexibility as a rationale, they have relegated Rule 801(d)(1)(B) to second-rate status as an evidence rule.

Advocates of the relevancy rule have uncharitably characterized the traditional rule as "rigid". *Miller,* 874 F.2d at 1274. But flexibility has never been sufficient justification for the admission of evidence. Our evidence rules purposely create limits. They are not designed to create an evidentiary free-for-all, in which any evidence is liberally admitted on the bare justification that the jury can weigh it. On the contrary, our evidence rules create many barriers to evidence, even evidence that is arguably relevant. *See, e.g.,* Fed. R. Evid. 801-804 (hearsay); Fed. R. Evid. 501-510 (privileges); Fed. R. Evid. 404 (generally precluding evidence of character and other bad acts); Fed. R. Evid. 610 (religious beliefs inadmissible to support credibility); Fed. R. Evid. 408 (offers to compromise inadmissible). All of these categories exclude from evidence some evidence that a factfinder could find relevant and useful. Yet our evidence rules, based on years of logic and experience, reflect general decisions about admissibility, relevancy, reliability, public policy, and efficiency. Because they address evidence in a general way, they might sometimes result in the exclusion of evidence that, in a specific case, might actually be reliable, true, and accurate. But that fact does not justify disregarding the particular evidence rule.

For example, the hearsay rules categorize the types of hearsay deemed reliable, and exclude all hearsay statements that do not fall within the firmly rooted exceptions or demonstrate sufficient indicia of reliability to fall within the catch-all exception. The hearsay rules set definite boundaries, and reflect general appraisals of what is reliable. *Idaho v. Wright,* 497 U.S. 805, 817 (1990) ("Admission under a firmly rooted hearsay exception satisfies the

constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."). Presumably, sometimes even hearsay that is inadmissible because it does not fall within an exception might be accurate, relevant, and reliable, yet without a showing that it meets the strict requirements of the hearsay rule exceptions, it is inadmissible. A party offering hearsay evidence, even if it is in fact true and accurate evidence, is not permitted to have the court engage in a case-by-case review of the particular item of evidence to see if it is relevant and true. That, however, is what the courts addressing Rule 801(d)(1)(B) and adopting a relevancy approach have done.

Just as the hearsay rules set definite boundaries for general categories of hearsay evidence, and make no exception for hearsay evidence that is "actually true", it should not matter under Rule 801(d)(1)(B) that a post-motive statement might actually be true in the specific case. The boundary has been set in Rule 801(d)(1)(B), and it allows only the admission of prior consistent statements made before the existence of a motive to fabricate. Just as other evidence rules contain built-in decisions about relevancy, reliability, and courtroom efficiency, there is nothing novel, backward, or "rigid" about a conclusion that Rule 801(d)(1)(B) contains its own built-in decisions about admissibility, including the foundational requirement that only those prior consistent statements that precede any motive to fabricate are relevant and reliable.

Additionally, the relevancy rule puts so much emphasis on other evidence rules for the governing analysis that it makes Rule 801(d)(1)(B) virtually superfluous. Under the relevancy approach, Rule 801(d)(1)(B) becomes a very limited starting point, defining only the general propositions that prior consistent statements must rebut a charge of recent fabrication, and can be used as substantive evidence. Under the relevancy rule, the real analysis is then provided by the hearsay rules, or Evidence Rule 402. When the admission of a prior consistent statement becomes an issue, a party may seek its admission under the hearsay rules, bypassing Rule 801(d)(1)(B) entirely, or it may rely on Rule 801(d)(1)(B) and the inquiry is quickly channeled to Evidence Rule 402. Consequently, under the guise of flexibility, the relevancy approach makes Rule 801(d)(1)(B) a minor evidence rule with no real use. In contrast, under the traditional rule, Rule 801(d)(1)(B) contains its own standards, provides for its own discrete treatment of prior consistent statements when used to impeach, and stands on its own as a meaningful evidence rule.

3. Trial and appellate policies support the traditional rule.

The traditional rule incorporates and is supported by many legitimate policies. It reflects the preference for live testimony under oath, is clear and easy to apply, eliminates unfair bolstering of a witness's testimony, is more efficient, and removes the opportunity to manipulate the trial process.

A. The preference for live testimony under oath.

Our law has frequently expressed a preference for statements, made under oath, and subject to confrontation. *Ohio v. Roberts*, 448 U.S. 56, 63, n.6 (1980); *Graham*, at 593 (there is a preference for testimony under oath over out-of-court repetition). These requirements reflect the view that in-court testimony is much more valuable, and more accurate, than out-of-court declarations. *Ohio v. Roberts*. The traditional rule is more consistent with these principles, because it puts a premium on live testimony. It requires a litigant to make his case in court, with statements made under oath and subject to confrontation. It does not allow the use of out-of-court statements, not made under oath, to support a case.

B. Ease and clarity of administration.

The traditional rule establishes a bright-line rule that is easily applied. Under this approach, the judge only needs to determine when the motive to fabricate arose, and can determine this prerequisite to admission as a factual matter. Fed. R. Evid. 104. In contrast, the relevancy rule imposes standards on admission apart from any temporal requirements. The application of these standards creates a difficult task for the trial court.

This case also demonstrates how the relevancy approach creates inaccuracy on appeal. In the search for standards under the relevancy approach, we run the risk that motivations will become generic, with appellate courts effectively classifying some motives as legitimate,

and others as weak. We run the risk that courts will turn to the written decisions of other courts to determine whether, for example, a child's desire to live with one parent over another is strong or weak. The Tenth Circuit did that here, relying on *United States v. Payne*, 944 F.2d 1458 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1598 (1992). Because *Payne* concluded that the fact that a sexually abused foster child may have been angry and falsely accused defendant for revenge was speculative, the Tenth Circuit here used *Payne* to support its own conclusion that A.T.'s motive was not sufficiently strong. *United States v. Tome*, 3 F.3d 342, 351 (10th Cir. 1993). Yet motives are highly personal, highly variable, and do not lend themselves to such a general approach.

Conversely, if we require courts to indulge in such factbound inquiries, we run the risk that the law will develop in a hodgepodge of holdings, with rulings on similar facts going different ways. The law's application becomes arbitrary and standardless. When the issue is reviewed on appeal, generally for an abuse of discretion, reviewing courts are denied the ability to fashion consistent standards and boundaries.

C. Considerations of efficiency and unfair bolstering.

The traditional rule will result in cleaner, shorter trials; cumulative evidence will be lessened or eliminated. *Graham*, at 581 n.22. In contrast, under the relevancy rule, one side may be permitted to parade in multiple witnesses to repeat what a witness has already told the jury. That aspect of the relevancy rule worked unfairly here,

because it created the unacceptable risk that A.T.'s testimony would become more credible when it was repeated by experts and health professionals. *See United States v. Mazza*, 792 F.2d 1210, 1215 (1st Cir.) ("the government effectively managed to have the jury hear a second-hand account of [the informant's] entire story through witnesses the jury was less apt to question"), *cert. denied*, 479 U.S. 1086 (1987). This risk is multiplied in a case like this, in which jurors may well be in unfamiliar territory, and will incorrectly assume that health experts in child sexual abuse have special insight into the child's credibility. The jurors might improperly conclude that the expert would not be repeating the child's statements if they were not true. In this way, the government is unfairly permitted to bolster its case with out-of-court statements. *Mazza*, 792 F.2d at 1215. This case shows how the government, in child sexual abuse cases, can have a field day with prior consistent statements that have no particular reliability.

D. Preventing the manipulation of the trial process.

The traditional rule is also preferable because it removes the temptation to manipulate the trial process. Permitting the admission of post-motive prior consistent statements creates the danger that a party may manufacture favorable testimony by ensuring that out-of-court statements are repeated to many people. *Miller*, 874 F.2d at 1275. While *Miller* expresses its concern that "criminal suspects" will manufacture testimony in this way, the concern is equally applicable to prosecutors and civil litigants, who will be encouraged to manipulate the trial

process by manufacturing as many favorable post-motive statements as possible. *United States v. Montague*, 958 F.2d 1094, 1098 (D.C. Cir. 1992) (recognizing that under the relevancy rule the prosecutor or an F.B.I. agent might question a witness immediately before trial for just the purpose of bolstering the testimony, allowing the jury to hear the statement directly and then again in the perhaps more credible voice of the agent); *Allison v. State*, 162 So.2d 922, 924 (Fla. Dist. Ct. App. 1964) (condemning the possibility, in a criminal case, that a witness's testimony could be blown up out of all proportion to its true probative force).

A judge can protect against this type of abuse, as the court in *Montague* concluded, but as a practical matter it will be difficult for a party to prove that this improper strategy has been pursued. In criminal cases, a defendant will have a difficult time proving that this strategy has been formulated, since he has no access to what goes on in the prosecutor's office. In civil cases, a party will be similarly hampered to discover what goes on in his adversary's office. By nature, the improper motive underlying these attempts to manufacture testimony will be secretive. Additionally, the ill-motivated strategy can easily be disguised as thorough trial preparation or some other legitimate pretrial activity. Litigants and judges should not be placed in the difficult position of proving or ruling on this issue. All temptation to manipulate the trial process can be removed by the adoption of the traditional rule.

Conclusion

When the language of Rule 801(d)(1)(B) is viewed in its proper historical context, it includes the requirement that the prior consistent statement must precede any motive to fabricate. This interpretation is also amply supported by trial and appellate policies. Judges may be capable of applying even the illusive standards and inquiries involved in the relevancy rule, but it is questionable whether the effort is worth its significant cost.

II. EVEN UNDER THE RELEVANCY RULE, PETITIONER SHOULD PREVAIL.

If the Court adopts the relevancy test, *amicus* respectfully contends that A.T.'s prior consistent statements should have been excluded even under that test. Contrary to the Tenth Circuit's conclusions, there is nothing about the statements that makes them reliable or trustworthy. Instead, they fall within the category of mere repetition.

1. Relevancy and reliability standards under 801(d)(1)(B).

The standards formulated by relevancy rule courts are designed to determine whether the post-motive statements are relevant and reliable. It is not clear, however, how probative they must be. *Miller* makes the standard relevancy under Evidence Rule 402 (more probable than not), yet later repeatedly requires "significant probative value" and "significant probative force". 874 F.2d at 1273-74. "Significant probative value" suggests a higher

standard than simple relevancy. *Parodi* defines the standard as "sufficient indicia of reliability." 703 F.2d at 787. Although the courts have discussed the Rule 801(d)(1)(B) analysis in terms of basic relevance, *Miller*, it oversimplifies to define the inquiry as one of relevance. Rather, it appears that in this context reliability is really the issue, and that reliability is what results in relevance. *See, e.g., Daubert v. Merrill Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786, 2797 (1993) (linking reliability and relevancy).

2. The Tenth Circuit's assessment of A.T.'s motive to fabricate is incorrect.

In this case, the court considered three factors: 1) the strength of the motive to lie; 2) the circumstances in which the statement is made; and 3) the declarant's demonstrated propensity to lie. 3 F.3d at 350. In *Miller*, the court required "significant probative value" to be indicated by an assessment of the motivation to fabricate ("a very crucial factor"). 874 F.2d at 1274. It suggested that the "surrounding circumstances" must also be considered. *Id.*

This evaluation is problematic. Motives are highly personal and defy generalization. Different people want different things, for different reasons, and with different conviction. When any court engages in an assessment of the strength and quality of a person's motive, it enters into a difficult inquiry. This case demonstrates that.

Here, the Tenth Circuit determined that a four or five-year-old child's desire to live with one parent over another is "not particularly strong." 3 F.3d at 351. This

assessment is very questionable. For a young child of divorced parents, the person he lives with may well be the most important circumstance in his life. It determines countless significant details, such as where he will live, what school he will attend, the availability of friends, what he will eat, what clothes he will wear, what television shows he may watch, and how often he will have his way. Also, children go through various developmental stages, during which they bond more strongly to one parent. Additionally, where, as here, a child is the subject of a custody battle, pressure might be applied to convince him to favor one parent over the other. This pressure might increase at the end of a long stay with one parent, when it is time for custody to change. Finally, children can be manipulative to get what they want, even at an extremely young age, and can also be manipulated. For these reasons, *amicus* respectfully suggests that the Tenth Circuit's assessment that A.T.'s motivation to fabricate was not "particularly strong" is incorrect.

3. Reliability guidelines in the confrontation cases of this Court may also provide useful guidelines under Rule 801(d)(1)(B).

If this Court adopts the relevancy rule, *amicus* respectfully suggests that the Court's analysis in some confrontation cases may provide analogous and useful guidelines, under Rule 801(d)(1)(B). Although the 801(d)(1)(B) relevancy rule cases do not engage in a confrontation analysis, the question is similar to the one raised in some confrontation cases. *See, e.g., Idaho v. Wright* (determining whether, given the surrounding circumstances, a child's out-of-court statement to a

physician was reliable enough to warrant admission); *Ohio v. Roberts* (determining whether an out-of-court statement has particularized guarantees of trustworthiness); *Lee v. Illinois*, 476 U.S. 530 (1986) (determining whether codefendant's out-of-court statement has sufficient indicia of reliability to warrant admission).

Many of the same factors used in the confrontation setting to determine "indicia of reliability" are the same or similar to those advocated in relevancy rule cases. For example, confrontation analysis and relevancy rule analysis both look to the circumstances surrounding the making of the out-of-court statement to determine its reliability. *Compare Idaho v. Wright*, 497 U.S. at 820-21 (indicia of reliability to be drawn from the totality of the circumstances surrounding the making of the statement) with *Miller*, 874 F.2d at 1274 (surrounding circumstances may give sufficient reliability) and *Tome*, 3 F.3d at 350 ("the circumstances in which it is made"). Under both analyses, statements against penal interest are considered more reliable. *Compare United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1980), *cert. denied*, 103 S.Ct. 77 (1982) (whether out-of-court statement is against penal interest is a consideration under confrontation analysis) with *United States v. Sampol*, 636 F.2d 621 (D.C.Cir. 1980) and *Parodi*, 703 F.2d at 787 (whether prior consistent statement is against penal interest is a factor under relevancy rule analysis). Self-serving statements are given little credence. *Compare Lee*, 476 U.S. at 544-45 (an attempt to shift blame makes statement unreliable) with *Miller*, 874 F.2d at 1274 (statements too self-serving to have significant probative value). Statements made in a bargain for leniency are suspect. *Compare State v. Earnest*, 744

P.2d 539, 540 (N.M.) (in confrontation setting, fact that statement was not made in an attempt to gain leniency gave reliability), *cert. denied*, 484 U.S. 924, 108 S.Ct. 284 (1987) with *Miller*, 874 F.2d at 1275 (statements made during criminal investigation are unreliable) and *Montague*, 958 F.2d at 1098 (promise of leniency and issue). However, any consideration of whether a prior statement has "sufficient indicia of reliability" should depend solely on the circumstances surrounding its making, not whether it is corroborated by other evidence at trial. *See Idaho v. Wright*, 497 U.S. at 820-21.

The idea that the threshold of reliability for prior consistent statements and some hearsay can be equated does not require a leap of faith. It makes sense that when the issue is reliability, certain factors will always be useful. It also makes sense that because the basic inquiry in both the confrontation setting and the 801(d)(1)(B) setting is the declarant's motive to lie, the factors bearing on reliability will be the same.

4. A.T.'s statements do not demonstrate sufficient indicia of reliability.

If the essential prerequisite for admitting prior consistent post-motive statements is that such statements must present sufficient "indicia of reliability" and "particularized guarantees of trustworthiness", this Court has already concluded that statements similar to the ones presented in this case do not meet that test. *Idaho v. Wright.*

Conclusion

When the language of Rule 801(d)(1)(B) is viewed in its proper historical context, it includes the requirement that the prior consistent statement must precede any motive to fabricate. If, however, this Court concludes that post-motive prior inconsistent statements are admissible under Rule 801(d)(1)(B), then A.T's statements should have been excluded because they are not sufficiently reliable under existing standards formulated by the relevancy-rule courts, or under analogous guidelines announced by this Court in confrontation cases.

Respectfully submitted,

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